

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-221857 **DATE:** April 29, 1986
MATTER OF: Sabreliner Corporation

DIGEST:

1. Protest of alleged defect in a request for proposals, concerning the solicitation's evaluation scheme of normalizing the cost of spare parts, must be filed prior to the closing date for receipt of initial proposals in order to be timely.
2. There is no basis for payment to protester of costs of filing and pursuing protests, including attorney's fees, where the protest grounds are either academic or dismissed as untimely and General Accounting Office has not determined that the procurement does not comply with statute or regulation.

Sabreliner Corporation protests any award under request for proposals (RFP) No. N00189-85-R-0148, issued by the Navy for operation of government-owned supply storerooms that provide material and supply support for military aircraft. We dismiss the protest.

Sabreliner filed its initial protest with our Office on February 7, 1986, four working days prior to the scheduled closing date for receipt of best and final offers, challenging various amended RFP provisions as ambiguous or defective.^{1/} The Navy responded by again amending several provisions of the RFP on which the protest was based, and by requesting a second round of best and final offers. In its report to our Office, the Navy argued that the amendments to the RFP either deleted or clarified all the RFP provisions complained of by Sabreliner and requested that we dismiss the protest as moot. In comments filed with our Office on April 1, Sabreliner agreed that all but one of its concerns had been resolved. We therefore limit our discussion to the issue that remains.

^{1/} Sabreliner was notified of the amendments at the same time the agency requested the firm's best and final offer.

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Sabreliner originally protested an RFP amendment that provided that the cost of material or services acquired from a vendor or subcontractor would be evaluated on the basis of a material handling factor (MHC), which is essentially a handling charge proposed by each offeror, to be added to pre-established government estimates for the line items involved. Thus, for evaluation purposes, the agency intended to use an estimated or "normalized"^{2/} cost for the material and service line items plus the offeror's MHC.

In response to the protest, the Navy deleted the MHC as an evaluation factor. Sabreliner argues, however, that the Navy failed to address its concern that the solicitation does not provide for evaluation of the actual cost of material and service support items. Specifically, Sabreliner objects to the Navy's normalizing the cost of materials and supplies as set forth in Section B, Part C of the schedule. In this regard, Sabreliner states that it is an original equipment manufacturer for some of these parts and therefore should receive evaluation credit for discounts on parts that it can offer. Sabreliner argues that the Navy's failure to so provide violates the agency's duty to obtain maximum competition.

We find this ground of protest untimely. Section B, Part C of the schedule, containing the Navy's pre-established cost estimates for the normalized parts, has been part of the solicitation since it was issued on February 11, 1985. Sabreliner has been participating in this procurement under these terms for approximately one year.^{3/} Any complaints by Sabreliner about the normalized

^{2/} We have observed that normalization is a technique sometimes used within the cost adjustment process in an attempt to arrive at a greater degree of cost realism. It involves the measurement of offerors against the same cost standard or baseline in circumstances where there is no logical basis for differences in approach, or in situations where insufficient information is provided with the proposals, leading to the establishment of common "should have bid" estimates by the agency. See Dynalectron Corp. et al., 54 Comp. Gen. 562 (1975), 75-1 CPD ¶ 17.

^{3/} While the provision for evaluation of an offeror's MHC was added to the solicitation as one of the amendments to the RFP that Sabreliner protested, the pre-established government cost estimates for the line items in question were always a part of the RFP.

costs thus should have been protested to the Navy or our Office as a solicitation impropriety prior to the initial closing date for receipt of proposals as required by our Bid Protest Regulations. See 4 C.F.R. § 21.2(a)(1) (1985); American Bank Note Co., B-212505.2, Oct. 25, 1983, 83-2 CPD ¶ 495.

Sabreliner argues, however, that it advised the Navy, prior to submission of initial proposals, that its prices for the questioned items would be based on its established catalog prices. According to Sabreliner, the Navy only rejected this interpretation by Sabreliner of the RFP's schedule when the Navy requested best and final offers. We find no merit to this argument. The schedule contained numerous line items with estimated quantities and required that the offerors insert unit prices and total amounts for each line item. Conversely, the material and services support items in the schedule (the normalized parts) had pre-established cost figures inserted by the Navy and prices for these items were not requested from the offerors. Thus, although Sabreliner is apparently arguing that it reasonably interpreted the solicitation as not providing for normalized evaluation for these listed parts, we think the solicitation terms were unambiguous.

Further, even ambiguous language in an RFP must be protested prior to the closing date unless the protester was unaware, prior to closing, that its interpretation of the RFP provision was not the only one possible. IBI Security Service, Inc., B-217069 et al., Apr. 26, 1985, 85-1 CPD ¶ 473. We do not consider this exception applicable here. In our view, the fact that the solicitation clearly called for prices for a majority of line items but had estimated prices already inserted for the protested line items at the very least should have raised a question about the proper interpretation of the RFP schedule.

Next, Sabreliner argues that its protest was timely filed because the Navy, during the course of the procurement, permitted the initial proposals to expire so that the Navy's request for best and final offers was essentially a new request for initial proposals. However, the fact remains that the offerors have been competing under the same solicitation terms for approximately one year. We do not think that our timeliness rules should be affected by whether or not, during the course of a negotiated procurement, the agency allows some or all offers to temporarily expire. Accordingly, we also reject this argument.

Additionally, Sabreliner argues that we should consider the protest because it presents a significant issue, and there is good cause for our Office to decide the matter. Specifically, Sabreliner argues that the Navy is normalizing these costs in an improper attempt to increase future competition at the expense of increasing its immediate cost. Our Regulations allow for consideration of the merits of an untimely protest for good cause shown or where the issue raised is significant to the procurement system.
4 C.F.R. § 21.2(c) (1985).

Generally, we apply the "significant issue" exception to our timeliness requirements sparingly, and only when the subject matter is of widespread interest to the procurement community and has not previously been considered by our Office. OAQ Corp., B-211803, July 17, 1984, 84-2 CPD ¶ 54. As stated above, Sabreliner protests a solicitation provision, which was inserted by the Navy in an allegedly improper attempt to increase future competition, and which allegedly has the net effect of increasing the government's total contract cost. A solicitation generally should be structured so as to fulfill the government's minimum needs at the lowest possible cost. See, e.g., Wheeler Brothers, Inc., B-212158, Apr. 25, 1984, 84-1 CPD ¶ 480. Nevertheless, we will not invoke the significant issue exception here because the protest was not filed until approximately one year after the solicitation was issued, and we do not find this matter to warrant consideration by our Office at this late date.

We also consider the good cause exception inapplicable. That exception is limited to circumstances where some compelling reason beyond the protester's control prevents the timely filing of a protest. Knox Mfg. Co.-- Request for Reconsideration, B-218132.2, Mar. 6, 1985, 85-1 CPD ¶ 281. That obviously is not the case here.

Finally, Sabreliner argues that since the Navy corrected the defective solicitation in response to its protest, it is entitled to the cost of filing and pursuing the protest. The authority to award a protester or other interested party attorney's fees is provided by the Competition in Contracting Act of 1984 (CICA). CICA provides in pertinent part as follows:

"If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract

does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of:

"(A) filing and pursuing the protest, including reasonable attorney's fees"

31 U.S.C.A. § 3554(c)(1) (West Supp. 1985).

Our Bid Protest Regulations, implementing this statutory authority, provide that:

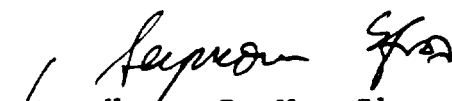
"If the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation it may declare the protester to be entitled to reasonable costs of:

"(1) Filing and pursuing the protest, including attorney's fees"

4 C.F.R. § 21.6(d).

Under this provision entitlement to payment of the reasonable costs of pursuing a protest, including attorney's fees, is expressly predicated upon a determination by this Office that a solicitation, proposed award, or award does not comply with a statute or regulation. See Pitney Bowes, Inc., 64 Comp. Gen. 623 (1985), 85-1 CPD ¶ 696. Here, our Office has not made such a determination since, as set forth above, the Navy issued an amendment that deleted or clarified all the RFP provisions complained of by Sabreliner, except for one untimely issue which we dismiss. Thus, since this Office has not determined that the solicitation in question does not comply with a statute or regulation, there is no basis upon which we may declare Sabreliner to be entitled to the costs which are claimed. See Monarch Painting Corp., B-220666.3, Apr. 23, 1986, 86-1 CPD ¶ ____.

The protest is dismissed and the claim is denied.

for 
Harry R. Van Cleve
General Counsel